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DEC 19 2008

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY [Signature]

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

MICHAEL L. FREEMAN,
Bar No. 010237

RESPONDENT.

No. 06-2029

**DISCIPLINARY COMMISSION
REPORT**

This sealed¹ matter first came before the Disciplinary Commission of the Supreme Court of Arizona on August 9, 2008, pursuant to Rule 58(e), Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed June 11, 2008, recommending dismissal. Based on *Carpenter v. Superior Court*, 176 Ariz. 286, 862 P.2d 246 (App. 1993), the Commission reversed the Hearing Officer's conclusion that the State Bar did not prove by clear and convincing evidence that Respondent violated the *second prong* of 4.4(a) (utilized methods of obtaining evidence that violated the legal rights of such person) and remanded this matter for consideration of Respondent's mental state, the presence of any aggravating or mitigating factors, whether Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice), and the appropriate sanction. See Commission Report filed August 13, 2008. Thereafter, an Agreement for Discipline by Consent was filed on October 16, 2008, however, no hearing was held on the Agreement.

¹ The file was sealed in this matter by the original Hearing Officer as confidential information is contained throughout in the record, specifically, references to the minor victim name. See Protective Order filed July 3, 2008.

1 The matter again came before the Disciplinary Commission on December 13, 2008 for
2 consideration of the Hearing Officer's Report filed October 28, 2008, recommending acceptance
3 of the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum
4 in Support of Agreement for Discipline by Consent providing for censure, two years of
5 probation with the State Bar's Law Office Management Assistance Program ("LOMAP")
6 including a practice monitor, six hours of continuing legal education ("CLE") on victims' rights,
7 and costs of these disciplinary proceedings and costs.

8 Decision

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10 Having found no facts clearly erroneous, the six members² of the Disciplinary
11 Commission unanimously recommend accepting and incorporating the Hearing Officer's findings
12 of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP)
13 and costs, including any costs incurred by the Disciplinary Clerk's office.³ The terms of
14 probation are as follows:

15 Terms of Probation

- 16
- 17 1. Respondent shall contact the Director of LOMAP within 30 days from the date
18 of the final Judgment and Order.
 - 19 2. Respondent shall submit to a LOMAP examination of his office's practices and
20 procedures, relating to, among other things, correctly filling out discovery subpoenas and giving
21 notice to all parties affected by discovery subpoenas.
 - 22 3. The Director of LOMAP shall develop written "Terms and Conditions of
23
24

25
26 ² Commissioner Horsley did not participate in these proceedings. Commissioners Flores and Todd
recused.

³ A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$3,061.25.

Probation” the provisions of which shall be incorporated herein by reference.

1 4. The “Terms and Conditions of Probation” shall include retention of a practice
2 monitor to supervise Respondent’s compliance with criminal discovery rules of procedures.
3 Respondent may suggest a practice monitor for State Bar approval and such approval shall not
4 be unreasonably withheld.
5

6 5. The period of probation will begin to run at the time of the judgment and order,
7 and will conclude two years from the date that all parties have signed the “Terms and Conditions
8 of Probation”.

9 6. Respondent shall be responsible for any costs associated with LOMAP.

10 7. Respondent shall attend a CLE program relating to the Arizona Constitution’s
11 Victims’ Bill of Rights. The CLE program must qualify for at least six CLE credit under Rule
12 45, Ariz.R.Sup.Ct., and associated regulations. Respondent shall be responsible for the cost of
13 attending the program and for producing satisfactory proof of attendance.
14

15 8. Respondent shall refrain from engaging in any conduct that would violate the
16 Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

17 9. In the event that Applicant fails to comply with any of the foregoing
18 conditions, and the State Bar receives information, bar counsel shall file with the imposing
19 entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing
20 Officer shall conduct a hearing within 30-days after receipt of said notice, to determine
21 whether the terms of probation have been violated and if an additional sanction should be
22 imposed. In the event there is an allegation that any of these terms have been violated, the
23 burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and
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25
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convincing evidence.

DATED this 19th day of December, 2008.

Jeffrey Messing/cs
Jeffrey Messing, Vice-Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 19th day of December, 2008.

Copy of the foregoing mailed
this 22nd day of December, 2008, to:

Philip Haggerty
Hearing Officer 6K
17409 North 20th Street
Phoenix, AZ 85022-2257

Treasure L. VanDreumel
Respondent's Counsel
Law Office of Treasure Van Dreumel, P.L.C.
2000 North Seventh Street
Phoenix, AZ 85006-0001

David L. Sandweiss
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

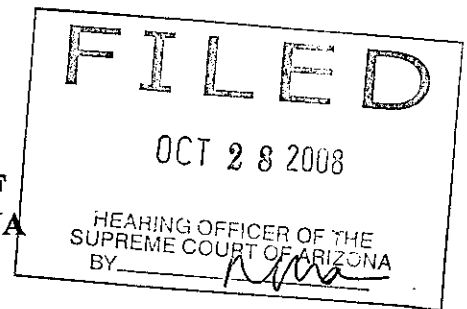
by: Evelyn Lopez

/mps

EXHIBIT

A

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

No. 06-2029

Michael L. Freeman,
Bar No. 010237

HEARING OFFICER'S
FINDINGS
AND
RECOMMENDATION

Respondent.

PROCEDURAL HISTORY

This case has a complex procedural history, and a recitation of all the prior pleadings would be needlessly time consuming and ultimately pointless. Fortunately, the prior ruling of the Disciplinary Commission limits the scope of this determination and recommendation.

The formal complaint was filed on August 7, 2007, alleging that Respondent violated Rule 42, Ariz.R.Sup.Ct, ERs 3.4(c), 4.4(a), 8.4(c) and 8.4(d). Respondent's answer was filed on September 2, 2007. A hearing was held on April 3, 2008. The Hearing Officer filed her report on June 11, 2008, containing Findings of Fact and Conclusions of Law in which it was held that Respondent committed none of the violations charged and recommended dismissal of the complaint. The State Bar appealed the Conclusions of Law to the Disciplinary Commission. On August 13, 2008 the Commission unanimously accepted the Hearing Officer's findings and

CECILIA L. HARRIS, CLERK

recommendations, except for that portion relating to “the second prong of ER 4.4(a); (“[o]r to use methods of obtaining evidence that violated the legal rights of such a person.”) The Commission remanded the matter to a new hearing officer to be appointed (since the hearing officer who conducted the case up to that point was no longer hearing cases), to determine whether the Respondent violated ER 8.4(d), and to make findings as to Respondent’s mental state, the presence of any aggravating and/or mitigating factors, and to make a recommendation as to any appropriate sanction.

On October 16, 2008 the Respondent and the State Bar submitted their Tender of Admissions and Agreement for Discipline by consent and their Joint Memorandum in Support of Agreement for Discipline by Consent.

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice in the State of Arizona, having been first admitted to practice in 1986. Respondent has been a certified specialist in criminal law continuously since 2000.
2. Respondent was retained to represent criminal defendant Jay Style in connection with a charge accusing him of sexually molesting his 10 year-old step-granddaughter (hereafter, “Minor”).
3. Respondent learned that Minor had obtained psychological counseling and sought her treatment records.
4. The State, the Minor and Minor’s mother refused to produce the records,

basing their abjection on the Arizona Constitution's Victims' Bill of Rights
(Ariz. Const., Art. II, §2.1, the Victims' Bill of Rights Enabling Statutes (A.R.S. §13-4401, *et seq.*) and Rule 39, Ariz. R. Crim. P.

5. Respondent filed a motion asking the trial court for its order compelling the State to produce Minor's counseling records.

6. The State objected, stating that it did not have the records to produce, and Minor and Minor's mother objected to Respondent's request, asking the court to deny the motion.

7. The trial court denied Respondents motion to compel the State to obtain and produce the records.

8. While Respondent's Motion for Reconsideration of this denial was pending, Respondent served Minor's counselor with a subpoena *duces tecum* for the records, without notice to the State, the Minor or Minor's representative.

9. In the Disciplinary Proceedings herein, there existed a legal dispute as to whether the holding of *Carpenter v. Superior Court*, 176 Ariz. 486, 862 P2d 246 (App. 1993) required Respondent to give notice to the State and Minor or Minor's representative prior to attempting to obtain the records through a subpoena, and whether Respondent was permitted to subpoena such records absent an accompanying Court Order issued pursuant to Rule 15.1(g), Ariz. R. Crim. P.

10. After consulting with its own legal counsel, the counseling agency complied with the subpoena and produced the records to Respondent. Respondent then

produced them to the State.

11. By obtaining Minor's counseling records through the use of a subpoena *duces tecum* in the absence of a Court Order issued pursuant to Rule 15.1(g), Respondent used "methods of obtaining evidence that violated the rights" of the Minor victim.

CONDITIONAL ADMISSIONS

1. Respondent conditionally admits that there is clear and convincing evidence that he violated the second prong of ER 4.4(a) when, in representing his client, he used methods of obtaining evidence that violated the legal rights of another person.

2. The State Bar of Arizona conditionally admits that there is no clear and convincing evidence that Respondent violated ERs 3.4(c), 8.4(a), 8.4(c) and the first prong of ER 4.4(a), and further conditionally dismisses the ER 8.4(d) charge in exchange for this consent.

Respondent's admissions are being tendered in exchange for the form of discipline set forth below.

SANCTIONS AND SANCTION ANALYSIS

In general terms, the State Bar and Respondent agree that the Respondent will receive a censure, with two years probation, CLE on Victims' Rights and payment of the costs and expenses of the disciplinary proceedings.

In determining the appropriate sanction, the Hearing Officer, the Disciplinary Commission and the Supreme Court consider the American Bar Association's

Standards for Imposing Lawyer Sanctions ("Standards") and Arizona case law.

Factors to be considered include the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and/or mitigating factors.

The parties agree that the misconduct in this case was the Respondent's use of a subpoena *duces tecum* to obtain evidence that violated the legal rights of the Minor.

It is agreed that the following *Standards* as they relate to the ER in question, 4.4(a) (Respect for Rights of Others) apply.

Standard 6.2 Abuse of the Legal Process

. . .

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule and causes injury or potential injury to . . . a party, . . .

6.23 Reprimand [censure in Arizona] is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a[n] . . . other party, . . .

Based on the conditional admissions herein, and the above noted presumptive sanctions, Respondent's misconduct could be suspension or censure.

The following must therefore be considered.

a. The duty violated

Respondent conditionally admits that he violated a rule relating to respect for the rights of others, specially the Minor victim, and also conditionally admits he

violated a duty owed to the legal system.

b. The lawyer's mental state

The parties agree that Respondent's conduct was either "knowing" or "negligent".

Were this matter to proceed to a sanction hearing, the State Bar would argue that

Respondent's interpretation of Rule 15.1(g) Ariz.R.Crim.P. and *Carpenter v.*

Superior Court, supra, was so anachronistic (*i.e.*, in order to obtain court authority

to issue a subpoena for Minor's treatment records, he first had to seek the records

without court authority, and fail to obtain them) as to create an inference that he

acted "knowingly" (*i.e.*, with conscious awareness that he violated rules of criminal

discovery in violation of a victim's rights). However, in its report, the Discipline

Commission described Respondent's argument on this point as "unreasonable".

This implied that Respondent deviated from the standard of care that a reasonable

lawyer would have exercised in the situation, which is the norm for "negligence".

c. The extent of actual or potential injury

The parties agree that Respondent's conduct caused actual harm to the Minor and

her family in the form of a breach of their rights of privacy. Respondent relied on

A.R.S. §13-3620(k) in concluding that the records obtained were expressly

exempted from any legal privilege.

d. Aggravating circumstances

The parties agree that the following factors should be considered as aggravating.

Standard 9.22(a), prior disciplinary offenses

1. Order of Informal Reprimand from the Probable Cause Panelist, filed June 1, 1994 in File No. 94-0049. Probable cause existed for Respondent's knowing conduct with a victim in a criminal case in violation of the Victims' Bill of Rights, specifically Rule 42, ER 3.4(c) Ariz.R.Sup.Ct.

2. Order of Informal Reprimand and one year of Probation from the Probable Cause Panelist, filed July 23, 1996, in File No. 95-1502. Probable cause existed because Respondent made contact with a victim in contravention of a court order and the Victim Rights Act on which the order was based. This conduct was in violation of Rule 42, ER 3.4(c) and Rule 51(e), Ariz.R.Sup.Ct.

3. Order of Diversion with LOMAP from the Probable Cause Panelist, Conflict Case Committee, filed January 13, 2004 in File No. 02-0434. Respondent violated Rule 42, Ariz.R.Sup.Ct., including ERs 1.2, 1.3, 3.2 and 8.4(d).

4. Order of Diversion with LOMAP from the Probable Cause Panelist Conflict Case Committee, filed January 13, 2004 in File No. 03-0168. Respondent violated Rule 42, Ariz.R.Sup.Ct. and ERs 1.15 and Rules 43(a), Rule 43(d) and Rule 44.(b).

Standard 9.22(c) a pattern of misconduct

The two Orders of Informal Reprimand, above, involved violations of the Victims' Rights Act, as did Respondent's conduct in this matter.

Standard 9.22(i), substantial experience in the practice of law

Respondent was admitted to the practice of law in 1985.

The State Bar has submitted that the following factors should also be considered in aggravation:

Standard 9.22(g) refusal to acknowledge wrongful nature of conduct

Standard 9.22(h) vulnerability of victim

e. Mitigating circumstances

Standard 9.32(b) absence of a dishonest or selfish motive

*Standard 9.32(e) full and free disclosure to a disciplinary board or
Cooperative attitude toward proceedings*

Standard 9.32(m) remoteness of prior offenses

PROPORTIONALITY

The purpose of discipline is to protect the public and the administration of justice, rather than to simply punish the lawyer for wrongful conduct. Part of the process to achieve this is to attempt to attain internal consistency with cases that are factually similar, while tailoring the discipline in each case to the individual facts and circumstances.

In *In re Edelman*, SB-04-0152-D the Respondent, a public defender, spoke to a represented person in a criminal matter without permission from that person's attorney and prepared an affidavit for the represented person to sign. Respondent was charged with violating ER 4.4 in addition to ERs 4.2 and 8.4(d). There were

two factors in aggravation, 9.22(a) and 9.22; both present in this case; and three factors in mitigation; 9.32(b) and (e), both present here, as well as 9.32(l) [remorse].

The mental state was "negligent" and the injury was potential rather than actual as here. The parties agreed to a censure which was sustained by the Commission.

This was the only case offered which involved a criminal attorney abusing process to aid his client's defense. The other cited cases essentially involved civil "abuse of process" by an attorney in representing his client and causing injury to another party or person, apparently by causing the affected person to expend money or time in responding to the abusive process. The cited *In re Doyle*, SB-06-0048-D matter is so completely different in its facts and allegations that it cannot be considered for proportionality at all.

FINDINGS AND CONCLUSION

Here we have a unique case of a lawyer facing a head on conflict between constitutional rights; the right of his client to a full and complete defense, and the rights of the victim under specific constitutional guidelines. The Respondent simply chose to ignore the victim's rights and to set himself up as the sole judge of how that conflict should be resolved. Case law in Arizona clearly points out that the trial judge can act as a fair arbitrator of these conflicting rights, while attempting to protect all involved. A judge in a criminal case has the right and duty to protect all rights in issue, and in a case such as this could have exercised this mandate through an *in camera* review of the Minor's counseling records or perhaps some closed

hearing testimony from the counselor. The material sought could have contained ;
(1) highly relevant material impeaching the Minor's police statements; or
(2) relevant, but cumulative repetition of the same accusation of the defendant or
(3) no inquiry into actual abuse or mention of it by the minor, proving or tending
to prove nothing. But in any event, the trial court could have dealt with the
information in a way designed to balance the competing interests of the defendant
and the victim. *State ex rel Romley v. Superior Court (Roper)*, 172 Ariz. 232, 836
P2d 445 (App. 1992, rev. denied 1992); *P.M. v. Gould*, 212 Ariz. 541, 136 P3d 223
(2006)

Based on the foregoing it is clear that the Respondent's admission that he has
violated that portion of ER 4.4 which prohibits the "use [of] methods of obtaining
evidence that violates the legal rights of such a person", by clear and convincing
evidence, is sufficient to form the basis of so finding this violation and the
Admissions and Agreement for Discipline by Consent are accepted.

AGREED SANCTION

It is further found that, based on the foregoing and the two prior informal
reprimands for other violations of victim's rights, that the following agreed sanction
is appropriate:

1. Respondent shall be censured for violating Rule 42, Ariz.R.Sup.Ct.,
ER 4.4(a).
- 2 Respondent shall be placed on probation for two years under the

following conditions:

a. Respondent shall contact the Director of the State Bar's LOMAP program within 30 days of the date of final judgment and order.

b. Respondent shall submit to a LOMAP examination of his office's practices and procedures relating to, among other things, correctly filling out discovery subpoenas and giving notice to all parties affected by discovery subpoenas.

c. The Director of LOMAP shall develop written "Terms and Conditions of Probation" the provisions of which shall be incorporated herein by reference.

d. The "Terms and Conditions of Probation" shall include retention of a practice monitor to supervise Respondent's compliance with criminal discovery rules of procedure. Respondent may suggest a practice monitor for State Bar approval and such approval shall not be unreasonably withheld.

e. The probation period will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation".

f. Respondent shall be responsible for any costs associated with LOMAP.

g. Respondent shall attend a CLE program relating to the Arizona Constitution's Victims' Bill of Rights. The CLE program must qualify for at

least six (6) CLE credit hours under Rule 45, Ariz.R.Sup.Ct., and associated regulations. Respondent shall be responsible for the cost of attending the program and for producing satisfactory proof of attendance.

h. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

i. In the event that Respondent fails to comply with any of the foregoing probation terms, and the State Bar receives information thereof, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days following receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence.

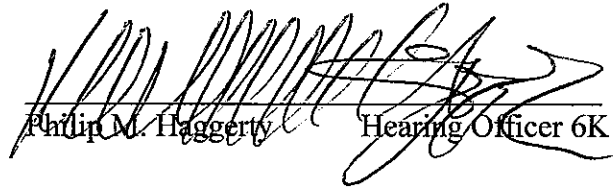
3. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided by the State Bar's statement of costs and expenses, attached hereto as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the

Supreme Court and the Disciplinary Clerk's Office in this matter.

RECOMMENDATION

It is therefore recommended that the Findings and Conclusion, and the Agreed
Sanction be adopted by the Disciplinary Commission.

Dated this 27th day of October, 2008


Philip M. Haggerty Hearing Officer 6K

1 Original filed with the Disciplinary Clerk
2 this 28th day of October, 2008.

3 Copy of the foregoing mailed
4 this 29th day of October, 2008, to:

5 Treasure VanDreumel
6 Respondent's Counsel
7 *Law Office of Treasure VanDreumel*
8 2000 North 7th Street
9 Phoenix, AZ 85006

10 David Sandweiss
11 Bar Counsel
12 State Bar of Arizona
13 4201 North 24th Street, Suite 200
14 Phoenix, AZ 85016-6288

15 by: 